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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

IN re MARCUS D., A Person Coming Under the Juvenile Court Law. _____ THE PEOPLE, Plaintiff and Respondent, v. MARCUS D., Defendant and Appellant.	B146739 (Super. Ct. No. NJ12840)

APPEAL from an order of the Superior Court of Los Angeles County, Marcus Tucker, Judge. Modified and, as so modified, affirmed.

Law Offices of Allen G. Weinberg and Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, and Zee Rodriguez, Deputy Attorney General, for Plaintiff and Respondent.

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Marcus D. appeals from the order declaring he remain a ward of the court (Welf. & Inst. Code, § 602), after the juvenile court found he had committed four counts of robbery (Pen. Code, § 211),[1] and found true the allegation that a principal was armed with a firearm during each offense (§ 12022, subd. (a)(1)). The juvenile court sentenced Marcus to be confined in the California Youth Authority and imposed a restitution fine (Welf. & Inst. Code, § 730.6, subd. (b)(1)).[2]

Marcus contends the juvenile court erred by: (1) sustaining one count of robbery committed against victim Jeffrey Beltz; and (2) improperly calculating his maximum confinement period. He further asserts that (3) the disposition order incorrectly reflects the amount of the restitution fine imposed. We order the disposition order amended to correctly reflect a $100 restitution fine and a maximum term of confinement of 10 years. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 9, 2000, shortly after midnight, Marcus and one or more accomplices robbed Marco Preciado and Claudio Lopez at gunpoint while the men were attempting to repair an automobile outside Lopez's home.

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1 All further undesignated statutory references are to the Penal Code unless otherwise indicated.

2 The petitions were filed, and the matter was adjudicated, in the Orange County juvenile court. After the adjudication hearing, the juvenile court found appellant's and his

Later that morning, at approximately 2:00 a.m., Olivia and Jeffrey Beltz[3] were returning to Jeffrey's home in Huntington Beach, driving separate cars. Olivia noticed a teal Mustang following her; eventually it passed her car and headed toward the beach. Jeffrey and Olivia parked in front of Jeffrey's residence, and Jeffrey approached Olivia's car to help her carry their leftovers from dinner. As Olivia was handing him the food, Marcus and an accomplice ran toward the couple. One of the robbers said, "Give us all you got." Jeffrey, who was "petrified," screamed to his roommates for help. Olivia, also frightened, was "frozen." When Jeffrey moved towards his home, one of the robbers pointed a gun at him. Olivia, afraid the robbers would kill Jeffrey, threw her purse toward them, saying "Take my purse, I have money." The robbers fled toward the beach.

Marcus and two other men were apprehended by police officers later that night. Olivia's purse, which contained $400, various personal belongings, and Jeffrey's checkbook, was found inside the trunk of the car in which Marcus was riding. When interviewed by a Huntington Beach Police officer and an Orange County Sheriff's Department investigator after waiving his *Miranda*[4] rights, Marcus confessed to robbing Olivia, Preciado, and Lopez.

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mother's legal residences were in Los Angeles County and transferred the matter to the Los Angeles County Juvenile Court for disposition.

[3] For ease of reference, and with no disrespect, we hereinafter refer to Mr. and Mrs. Beltz by their first names.

[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

DISCUSSION

1. *The evidence was sufficient to support the juvenile court's finding that Marcus robbed Jeffrey.*

Marcus contends that, because there was no evidence Jeffrey knew his checkbook was in Olivia's purse at the time of the robbery, the evidence was insufficient to prove Jeffrey was robbed. The crux of Marcus's argument is that "[t]he use of force or fear could not have caused Jeffrey to relinquish control of an object that he did not know was present." Marcus urges that a robbery cannot occur unless the victim is aware that "some item [in which] he or she has a possessory interest . . . is being taken."

When determining whether the evidence is sufficient to sustain a conviction, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "[T]he test of whether evidence is sufficient to support a conviction is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 667.) "We draw all reasonable inferences in support of the judgment." (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears that " 'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The standard of proof in juvenile proceedings involving criminal acts is the same as that in adult criminal trials. (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1088.)

Robbery is " 'the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.' " (§ 211; *People v. Nguyen* (2000) 24 Cal.4th 756, 759.) In other words, section 211 "limits victims of robbery to those persons in either actual or constructive possession of the property taken." (*Id.* at p. 764.) "Constructive possession depends upon a special relationship with the owner of the property . . ." (*Sykes v. Superior Court* (1994) 30 Cal.App.4th 479, 484.) More than one person may be in constructive possession of property simultaneously. (*People v. Miller* (1977) 18 Cal.3d 873, 881; *People v. Marquez* (2000) 78 Cal.App.4th 1302, 1308.) "[T]he requirement that the property be taken from the 'possession of another' may be established only by proving the victim has *a legally recognizable interest in the property* or actually possessed it." (*People v. Galoia* (1994) 31 Cal.App.4th 595, 599 fn. 1, italics added.)

The "fear" element is satisfied when the victim fears an unlawful injury to his person or property, or to the person or property of a member of the victim's immediate family or anyone in the victim's company at the time of the robbery. (§ 212.) Property is within a victim's immediate presence when it " ' " 'is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it.' " ' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 955.)

Marcus's contention fails because his factual premise does not withstand scrutiny. Contrary to Marcus's assertions in his opening brief, the record does *not* establish that Jeffrey was unaware his checkbook was in Olivia's purse, or that he was "surprised" to find

it there when the purse was recovered. As the People point out, and as Marcus concedes in his reply brief, Jeffrey's only testimony regarding the checkbook was that he had identified Olivia's purse when asked to do so by the police, and the purse contained his checkbook and some of Olivia's possessions.[5] However, the trier of fact could reasonably conclude that Jeffrey knew the checkbook was in Olivia's purse when the purse was taken. Jeffrey referred to the checkbook as "my checkbook," suggesting he and Olivia did not share it. The court could legitimately have inferred that Jeffrey knew the whereabouts of his checkbook, personal property intimately related to his financial affairs. Marcus argues "[t]he evidence [was] clear" that Jeffrey and Olivia were living in separate residences. Assuming this fact, it is even less likely that Olivia could have had possession of Jeffrey's checkbook without his knowledge. The contrary scenario – that Jeffrey's checkbook managed to find its way into Olivia's purse without his knowledge – is contrary to common experience and certainly not an inference the trier of fact was required to draw.

In any event, we reject Marcus's contention that actual knowledge the checkbook was in Olivia's purse was necessary under the circumstances presented here. All elements required to prove violation of section 211 were met. Jeffrey's personal property, his

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[5] The relevant portion of testimony was as follows:
"[Defense counsel]: [W]ere you able to identify the purse?
"[Jeffrey]: Yes, I was.
"[Defense counsel]: And did they [police officers] show you anything else besides the purse and the individuals?
"[Jeffrey]: No, they did not, they just had the purse on top of the vehicle and asked me to go see if that was her purse and indeed had my checkbook in it and some of her things."

checkbook, was taken. While Jeffrey did not have physical possession of the property, he had a possessory interest in it because he was the checkbook's owner. Jeffrey was present, a few feet away, when the robbery occurred; he was aware the robbers demanded money and took Olivia's purse. The taking was obviously against his will. Olivia testified she threw the purse to the assailants because she feared they would kill Jeffrey, and Jeffrey testified he was "petrified." Had he not been petrified, he could have taken steps to prevent the robbery. Therefore, all elements required to prove the robbery of Jeffrey were established.

Marcus's argument, reduced to its essence, is that a robbery victim does not "possess" property that he or she owns, for purposes of the robbery statute, unless he or she is aware it is being taken at the moment of the robbery. This contention lacks merit. As explained, a victim possesses property if he or she has a legally recognizable interest in it (*People v. Galoia, supra,* 31 Cal.App.4th at p. 599, fn. 1), as did Jeffrey. Moreover, courts have not found a victim's lack of knowledge that an item was being taken precluded a robbery conviction. For example, in *People v. Gordon* (1982) 136 Cal.App.3d 519, 524, robbers bound two parents on the kitchen floor of the parents' home, and then took a bag from their son's bedroom. The parents saw nothing else taken from the residence. The son testified that two pounds of marijuana, $1,000 in cash, and a shoulder bag were missing from his bedroom. (*Id.* at pp. 523-524.) There was no evidence the parents physically possessed the items taken or saw the marijuana and cash as it was removed from the premises, apparently in the bag. Both parents denied knowledge of the marijuana, and neither was questioned regarding the cash. Nonetheless, there was substantial evidence to

prove the items were taken from the parents' possession, because the jury could infer the parents had a responsibility to protect goods belonging to their son who resided with them. (*Id.* at p. 529.)

In *People v. Frye, supra*, 18 Cal.4th at pp. 955-956, the defendant killed two victims and then robbed them. The California Supreme Court rejected claims that, because the victims were dead at the time their property was taken, there was no evidence of a taking from the person or immediate presence of the victims. (*Ibid.*) The court reasoned, "the requirement that the taking be from the ' "person" ' or ' "immediate presence" ' of the victim describes a spatial relationship between the victim and the victim's property, and refers to the area from which the property is taken. Thus, the decisions addressing the 'immediate presence' element of robbery have focused on whether the taken property was located in an area in which the victim could have expected to take effective steps to retain control over his property. [Citations.]" (*Ibid.*) The evidence was sufficient to prove robbery where "the jury could have reasonably inferred that had the [victims] not been shot by defendant, they could have taken effective steps to retain control of their property." (*Id.* at p. 956.)

Thus, the victim's knowledge, at the moment of the taking, that particular items are being stolen is not an element of robbery. The parents in *Gordon* were unaware of the existence of, and were not questioned regarding their knowledge of, the stolen marijuana and cash, respectively. Obviously, the victims in *Frye* were unaware their property was being taken, as they were deceased at the time. However, in neither of these cases did the

victims' lack of knowledge that the property was being taken prevent a finding of robbery. The same is true here. (See also *People v. Harris* (1994) 9 Cal.4th 407, 422-424 [robbery conviction upheld where victim was restrained outside while robbers took property from victim's office and home].)

Furthermore, the mere fact Olivia happened to be holding the checkbook did not affect the robbery finding. (*People v. Prieto* (1993) 15 Cal.App.4th 210, 212-214, 216 [robbery convictions upheld as to two victims where one victim held her own purse and second victim's purse, and both purses were pulled away by robber]; *People v. Miller, supra,* 18 Cal.3d at p. 880 [" 'Robbery is an offense against the person; thus a store employee may be the victim of a robbery even though he is not its owner *and not at the moment in immediate control of the stolen property*.' [Citation.]" (Italics added.)]; *People v. Clay* (1984) 153 Cal.App.3d 433, 458-459 [wife told husband to get his wallet after robber demanded money, and wife gave husband's wallet to robber; both spouses were victims, as both were in joint possession of item; " 'if force or fear is applied to two victims in joint possession of property, two convictions of robbery are proper[.]' "].)

The cases cited by Marcus are distinguishable. In *People v. Nguyen, supra,* 24 Cal.4th 756, a visitor was present at a business to attend a birthday celebration when armed robbers took property from the business and from some employees. The trial court improperly instructed the jury that the visitor could be a robbery victim based upon the taking of the business's property. This was error because the visitor was not in actual or

constructive possession of the business's property. (*Id.* at p. 764.) Unlike in *Nguyen*, however, here the property taken *belonged* to Jeffrey.

Marcus also argues that, to prove a defendant had constructive possession of drugs (*People v. Morales* (2001) 25 Cal.4th 34, 41; *People v. West* (1990) 224 Cal.App.3d 1337, 1347-1348), the People must prove the defendant was "at least cognizant of that ownership or possession." However, the cited cases by Marcus address a defendant's culpability for constructive possession of contraband, not a victim's possession of property for purposes of section 211. They are thus inapposite.

2. *The maximum confinement term was improperly calculated.*

Marcus contends, and the People agree, that the juvenile court improperly calculated Marcus's maximum period of confinement. We agree.

The juvenile court initially calculated Marcus's maximum period of confinement as 17 years. The court's minute order reflects a maximum period of confinement of 13 years. As the People point out, however, the correct maximum term of confinement is 10 years.

In 1999, a petition alleging Marcus had committed robbery was sustained and Marcus was given suitable placement. The juvenile court in the instant matter found Marcus in violation of probation on that offense, based upon Marcus's commission of the Beltz, Preciado, and Lopez robberies. Therefore, Marcus's maximum period of confinement should have been calculated as follows: the upper term of five years for the 1999 robbery conviction (§ 213, subd. (a)(2)), plus one year for the arming enhancement (§ 12022, subd. (a)(1)); plus consecutive terms of one year (one-third the midterm) on each of the four

instant robbery convictions (§§ 213, subd. (a)(2); 1170.1, subd. (a); Welf. & Inst. Code, § 726). In 2000, when the instant crimes were committed, section 1170.1 provided that enhancements could not be imposed on subordinate terms for offenses not defined as violent felonies by section 667.5, subdivision (c). In 2000, section 667.5, subdivisions (c)(a) and (c)(18) defined only first degree robbery and other specified robberies, such as those committed in an inhabited dwelling, as violent felonies; second degree robbery was not so denominated. Marcus was found to have committed second degree robbery. The robberies of Lopez, Preciado, and the Beltzes occurred outdoors, not in an inhabited dwelling. Thus, at the time of the offenses, section 667.5, subdivision (c) did not define the robberies as violent, and the section 12022, subdivision (a)(1) arming enhancement should have been imposed on the principal term, but not on the subordinate terms. Accordingly, Marcus's maximum period of confinement should have been calculated as 10 years. We order the court's minute order modified accordingly.

3. *The minute order must be amended to reflect a $100 restitution fine.*

At the disposition hearing, the juvenile court orally imposed a $100 restitution fine. This was proper under Welfare and Institutions Code, section 730.6, subdivision (b)(1) [providing that, "In every case where a minor is found to be a person described in Section 602 by reason of the commission of one or more felony offenses, the restitution fine shall not be less than one hundred dollars ($100) and not more than one thousand dollars ($1,000)."].) The juvenile court's minute order, however, indicates that a $200 restitution

fine was imposed. Marcus contends, and the People agree, that the minute order should be corrected.

As a general rule, when the reporter's and clerk's transcripts are in conflict, we harmonize the record if possible. " '[W]here this is not possible that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to greater credence [citation].' " (*People v. Smith* (1983) 33 Cal.3d 596, 599; cf. *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [abstract of judgment is not judgment of conviction and does not control if different from the trial court's oral judgment]; *People v. Mesa* (1975) 14 Cal.3d 466, 471 [rendition of judgment is an oral pronouncement; where discrepancy exists between oral judgment and that entered in the minutes, clerical error in minutes is presumed].) Here, the reporter's transcript appears to be the more reliable record and the minute order notation appears to be a clerical error. Therefore, we order the minute order amended to correctly reflect imposition of a $100 restitution fine. (*People v. Mitchell*, *supra*, 26 Cal.4th at p. 185 [appellate court may properly correct clerical errors in records on its own motion or upon application of the parties].)

DISPOSITION

The juvenile court is ordered to issue an amended minute order reflecting imposition of a $100 restitution fine (Welf. & Inst. Code, § 730.6, subd. (b)(1)) and a maximum confinement term of 10 years. In all other respects, the order of wardship is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P.J.

KITCHING, J.